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JAMES H. McKENNEY,

No. 212

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

THE WILLIAM W. BIERCE ~~COMPANY,~~ LIMITED, a Corporation,
Appellant,
vs.
CLINTON J. HUTCHINS, TRUSTEE,
Appellee.

APPEAL FROM SUPREME COURT OF TERRITORY OF HAWAII.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

A. B. BROWNE,
ALEX. BRITTON,
JOHN W. CATHCART,
WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
For Respondent.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906.

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An action of replevin in the Circuit Court of the First Circuit, Territory of Hawaii, commenced July 20th, 1903, judgment entered March 16th, 1904, for the property or for its value in the sum of Twenty-two Thousand Dollars ($22,000.00) from which the defendant took exceptions to the Supreme Court of the Territory of Hawaii, which, on the 28th day of January, 1905, reversed the judgment, and subsequently, on May 6th, 1905, on motion of plaintiff remanded the case to the Circuit Court with instructions to enter judgment for the defendant, upon plaintiff's statement that it would have no further evidence to present at a second trial in case the same was remanded to the Circuit Court for further proceedings; the action being

to recover certain rails, cars, locomotives and equipment of a railroad on the plantation of the Kona Sugar Company, Limited, all the property of which company had been purchased by the defendant at a Receiver's sale.

On the 17th day of February, 1900, at a meeting of the Directors of the Kona Sugar Company, Limited, the plaintiff, through its agent, Mr. Frank Davies, whom it had sent to the islands to solicit business, made a contract of absolute sale of the railroad, track and equipment sought to be repleved, which was verbal and to be binding when accepted by the company's agents, M. W. McChesney & Sons. On the 21st the agent put the proposition into writing, which was accepted on the 22nd by the agents of the Kona Sugar Company, Limited. (Transcript pp. 145, 150.) By this contract the material was sold for specific prices and not for a lump sum and the terms of payment were: "Cash upon presentation of demand draft attached to bill of lading issued by initial line of railroad, showing that material had been shipped through to Honolulu." (Transcript p. 149.) Twenty-five Hundred Dollars ($2500.00) in paid-up stock of the Kona Sugar Company, Limited, being the first payment on account. The Kona Sugar Company, Limited, failed to pay these drafts, and the plaintiff sent Mr. Harry T. Gilbert to Honolulu to attend to the matter and collect the price of the railroad equipment (Trans. pp. 135, 157, 158); he effected a settlement, in the course of which he had his attorney prepare the letter, Exhibit "B," attached to the deposition of Columbus Bierce (Trans. pp. 153, 154); received Ten Thousand Dollars ($10,000.00) in New York exchange and a promissory note for Thirty-seven Thousand, Forty-four Dollars and Fifty-three Cents ($37,044.53) payable six months after date, which recited that it was secured by bonds of the Kona Sugar Company, Limited, of the value of Thirty-eight Thousand Dollars ($38,000.00). The letter with the acceptance, signed by the president and treasurer of the Kona Sugar Company, Limited, is as follows:

"Honolulu, H. I., March 13, 1901.

Kona Sugar Company, Limited,
Honolulu, H. I.

Gentlemen:—

In pursuance of the verbal arrangement made between your President and William W Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you, payment of the money and the delivery of the note, with collateral, before 4 p. m. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Yours very truly,
(Signed) W. W. Bierce, Ltd.
By H. T. Gilbert."

"The above Terms are accepted this March 13th, 1901.

Kona Sugar Co., Ltd.
By its President, J. M. McChesney.
By its Treasurer, F. W. McChesney."

Upon receiving the drafts and note Gilbert caused the bills of lading of the various shipments of the railroad equipment to be released from the drafts before mentioned, which were cancelled. (Trans. p. 160.)

Gilbert testifies that he proposed a settlement upon this basis because he despaired of collecting the full purchase price in cash; that the instrument was drafted at his request by one of the plaintiff's attorneys and that after its execution the railroad equipment in question was transported from Honolulu to the Kona District and there used in constructing and operating the plantation railroad of the Kona Sugar Company, Limited, and that in December, 1901, when he was again on the island for the purpose of collecting the unpaid balance of the purchase price, he visited Kona and saw "the railroad equipment in question was used and operated in constructing and running a plantation railroad of the Kona Sugar Company, Limited, in connection with its sugar mill, and I then saw the locomotives and cane cars in operation in the work of hauling cane to the mill." On the 16th day of March, 1901, the settlement of March 13th, including the delivery of the company's note and bonds of the nominal value of Thirty-eight Thousand Dollars ($38,000) was ratified and approved but no mention was made of any written instrument signed or to be signed in behalf of the company nor of any reservation of title to the property; on the same date Fifty Thousand Dollars ($50,000) of its mortgage bonds were sold to Bishop & Company, bankers, One Hundred Thousand Dollars ($100,000) of the mortgage bonds were delivered to the agents to secure the balance of the account, and the president and treasurer authorized to execute a mortgage in the name and behalf of the company to secure the same. (Trans. pp. 173-174.)

The plantation proving unprofitable, upon proceedings had in the Circuit Court of the Third Circuit of Hawaii, a Receiver, M. F. Scott, was appointed, who was afterwards discharged, another Receiver, F. L. Dortch, appointed, and all the property of the plantation sold to the Appellee in this action and the sale confirmed June 1st, 1903, against the objection and appeal of

Appellant to the Supreme Court of the Territory of Hawaii (Trans. pp. 182-187).

McChesney v. Kona Sugar Co., Ltd., 15 Haw. 710.

The appeal by the Appellant from the confirmation of the sale to the Appellee was pending at the time of the trial of the present action in the Circuit Court of the First Circuit in the Territoy of Hawaii, and was decided June 4th, 1904, while the present action was pending on appeal.

From the poceedings in the case of *McChesney v. Kona Sugar Company*, all of which are in evidence in this case, but all of which are not printed, it appears that the William W. Bierce Company, Limited, first sought to recover the amount of its claim from and establish a mechanic's lien against the property of the plantation. In order to maintain this mechanic's lien it petitioned by intervention in the case of *McChesney v. Kona Sugar Company* for permission to sue the receiver, and in that suit sought to recover against the plantation on the claim. This suit was brought in order to secure the right of the plaintiff not to the property but to payment of the note, the proceedings being then carried on under an agreement of creditors, by which liens were to be preserved, and the plaintiff desiring to preserve its lien. The testimony of one of the attorneys for the plaintiff, E. B. McClanahan, Esq., cited in full by the plaintiff in his petition for mandamus is worthy of citation and we here give it:

"The Witness. As a result of a great many conferences between the officers of the Kona Sugar Co. and bondholders, stockholders and creditors, a committee was appointed, called a bondholders' committee, for the purpose of superintending the affairs of the corporation, which were then in the hands of a receiver, with the idea of and with the purpose of taking off the crop of sugar that was then maturing and realizing the sale of the sugar as an asset in order to pay the creditors of the corporation and clear its debts. This committee agreement was submitted to the court and received its approval, and under it for some time the receiver worked. The committee consisted of Cecil Brown, S. M. Damon and Mr. Humberg of Hackfeld & Co. Prior to the making of this committee agreement on the 12th day of May, we filed a notice of lien in this suit—in this

matter. This lien was discontinued on the first of August, 1902,—No, suit was brought on this lien on the first of August, 1902, and on the 23rd of January, 1903, the suit was discontinued.

All of the acts which we did for Bierce & Co. at this time prior to the discontinuance of the suit looked towards the possible chance or possibility of saving the corporation's property. Everything was done to prevent an entire liquidation and surrender the loss of all these assets. When this purpose was finally abandoned it was because it was found to be impossible to save any of the assets of the corporation to pay anybody. We found that the receivers were running behind even in their receiver charges and couldn't pay the charges of the receiver itself, the receiver's certificates could not be paid. When this state of affairs came about and it was found then to be absolutely abortive and useless to attempt to do anything for the rehabilitation of the plantation, we then abandoned our mechanic's lien suit, dismissed it and had recourse to our replevin suit.

We didn't take this action in the first instance because we knew that to take those rails back off the property of the Kona Sugar Company would mean a collapse of the company at once, with loss of thousands to the creditors, because the railroad was absolutely essential to taking off a certain portion of the crop of the Kona Sugar Company, and the only reason for filing this lien which we thought we had a right to file at the time, without looking it up very carefully, the only reason for filing it was simply to fortify our position as a possible creditor or claimant of the estate.

When we filed this lien there was a certain provision in this creditors' contract which provided for a priority of payment of claims, and lien holders were preferred over certain other holders. We gave no thought whatever, at the time of filing the lien to whether it was a valid lien or whether it was an invalid lien. We have since learned that it was absolutely a nullity and of no value whatever to Bierce & Co. the filing of this suit. This is Bierce & Co.'s position from the start, so that they as bondholders occupied a more secure position in order to get their money than as lien-holders or common creditors, and it was the desire of Bierce to get their money in some way. They didn't want the property at the time, they wanted the money; they wanted the contract carried out; they wanted the note of the Kona Sugar Company paid, and we simply filed this lien at the time as an additional lever on the hold on the material so furnished. That is all." (Tr. pp. 95-97.)

On cross-examination the witness stated that Mr. Bigelow was a member of the firm and had entire charge of the matter on which he had testified; that the first claims to be paid under the arrangement from the sale of the sugar were the laborers who were threatening to do all sorts of things, and that his firm had absolute authority to do all that was fit and proper in the premises for Bierce and Company. That the lien was filed on May 12th, 1902, and the creditors' agreement was dated May 15th, 1902; that the lien suit which was brought on the first of August, 1902, was discontinued on the 25th of January, 1903, when things were chaos and everybody giving up, the bondholders being determined to write their bonds off at that time; that the petition and intervention were filed in the nature of an equitable replevin so that if the sale took place the right under this lien would be protected. (Trans. pp. 97-99.)

The action was originally brought by M. W. McChesney & Sons on March 28th, 1902, against the Kona Sugar Company and the First American Savings and Trust Company of Hawaii, Limited, a corporation, which held a deed of trust for the $200,000 of bonds. The latter appeared at the hearing, joined in the prayer of the petitioner asking for the appointment of a receiver, consenting thereto, and praying that a decree of foreclosure issue out of this court upon the property. (Trans. pp. 209, 210, 212, 213.) The final order of sale made April 20th, 1903, (Tr. pp. 220-224), after reciting a previous order of the 1st of November, 1902, in which it had been attempted to sell all the property of the Kona Sugar Company, subject to all liens of every kind and nature, at which no bidder appeared, and that the expenses of the receivership were increasing beyond the income and that the property would be absolutely and entirely unproductive, directed a sale of all and singular the property of the Kona Sugar Company "and all of its right, title and interest in and to lands, leasehold interests, rights of way, railroads, railroad equipment, locomotives, cars" and all other property of every kind and description free and clear of all liens and incumbrances of every kind, for the purpose of paying the debts and liabilities incurred by the receiver in the management and

control of said property, and also such other property lien, compensations and disbursements of the receiver as may be directed to be paid by the order of the court to satisfy, liquidate and discharge so far as may be and in the order of their preference, all liens, claims or demands, legal or equitable, instituted against the Kona Sugar Company, and directed the execution of a conveyance to vest in the purchaser, the defendant in this action, the right, title and interest of the Kona Sugar Company, free and clear of all incumbrances. (Trans. pp. 225-226.)

Three days before the execution of the Creditors' Agreement under which the foreclosure was carried on, and to take advantage of that agreement, as Mr. McClanahan testifies, the plaintiff in this action filed his notice of lien (Trans. pp. 251-2), the property on which the lien was filed being described as follows:

"All that certain cuttings, embankment, grading and filling, and track, switches, buildings, cars, engines and other property forming and constituting the line, roadway and equipment of the single track railroad of the Kona Sugar Company, Limited, said railroad being located on the plantation of the said Kona Sugar Co., Ltd., in the District of South Kona, Island of Hawaii, Territory of Hawaii, and its situation being more particularly described as follows: Beginning at the mill of the said company and thence running in a general southerly direction at an elevation approximately of 686 feet above the level of the sea for a distance of seven miles, more or less, from said place of beginning."

The lien was claimed for the sum of Thirty-seven Thousand Forty-four and 53/100 Dollars ($37,044.53) with interest, for the materials furnished in the construction and equipment of said railroad, a schedule being annexed, with the amount and value of the materials set forth in accordance with the contract of February 21-22, 1900, and on the 31st day of July, 1902, the plaintiff applied to the judge of the Circuit Court of the Third Circuit, for leave to join in the action upon said lien. M. F. Scott, Receiver of said company, which permission was granted by said court on the first day of August, on which date the plaintiff filed its complaint to enforce the lien in said court, (Trans. pp. 246-250,) setting forth the contract of February 21st, 1900, which was annexed to the complaint, that the mate-

rials were furnished at the prices and upon the terms agreed upon in said contract as set forth in the notice of lien; that they had been used by the Kona Sugar Company, Ltd., in the construction and equipment of its railroad; that plaintiff had done and performed its part of said contract, but that the defendant and receiver had neglected and failed to pay the sum of $37,044.53 for which the plaintiff claimed a lien upon said property, for which judgment was asked against both defendants and for the enforcement of said lien. This action was brought under Chapter 2 of the Acts of 1888, Civil Laws, sections 1741-1745, now found in the Revised Laws of Hawaii, 1905, sections 2173-2177.

While this complaint was pending the W. W. Bierce Company, Limited, on November 21st, 1902, filed a motion in said Circuit Court of the Third Judicial Circuit for leave to intervene in the action of *McChesney & Sons v. Kona Sugar Company, Limited,* on the grounds set forth in their petition of intervention, which petition was filed November 24th, 1902, which leave was duly granted by said court. (Trans. pp. 257-266.) In that petition as in the Claim of Lien and Petition to enforce the Lien above referred to, the plaintiff set forth the contract of February 21st, 1900, the furnishing of the materials under the contract to the Kona Sugar Company; that there was due $37,044.53, the filing of the lien upon the railroad, the bringing of the suit, also "that the said Intervenor William W. Bierce, Ltd., is the holder and owner of Forty-five Thousand Dollars worth of the first mortgage bonds of said Kona Sugar Co. Ltd.; which said bonds are secured by a mortgage upon all of the property of the said Kona Sugar Company, Ltd., including that property herein below in paragraphs XI & XII of this petition and intervention more fully referred to and described." That McChesney & Sons had filed a petition praying that all the property of the company should be sold subject to all liens of every kind; that a decree was made on the 5th of November, but that the decree was not in conformity with the prayer, in that it ordered the property to be sold, including the property on which William W. Bierce Company, Ltd., had filed

a lien; "that each and all of said property thus decreed by the said court to be sold as aforesaid and advertised by the said F. L. Dortch, as Receiver of the Kona Sugar Company, Ltd., to be sold in the manner and form above set forth, is the same property which was conveyed by mortgage to secure to this intervenor, amongst other, the payment of the bonds hereinabove more specifically set forth as being now held by the intervenor herein."

Wherefore, the Intervenor prayed that the decree might be modified so as to save and except from the operation thereof all liens, rights and claims herein set forth and that the property might be sold subject to the said liens.

Apparently from the final decree of sale this modification was made, although it is not set forth in the record. But no sale was effected, although the same was attempted on the 4th day of December, 1902, and the 15th day of December, 1902. (Trans. pp. 220-1.)

The plaintiff, on the 23rd day of January, 1903, discontinued its lien suit and on the 3rd day of February, 1903, made a motion asking leave to join F. L. Dortch, the Receiver, as defendant in an action of replevin. (Trans. p. 208.) This motion was denied on February 5th, on the ground that it appeared that the plaintiff had previously filed a mechanic's lien and had also filed a Petition in Intervention to enforce the lien, and had discontinued its lien and suit; that other parties had filed materialmen's liens against the same property, and that suits had been instituted for their enforcement, which were then pending; that the First American Savings and Trust Company of Hawaii, Limited, had filed its answer in the court, alleging that it held a mortgage on all the property and praying for a foreclosure, and that as the plaintiff being a party to the action, knew all the facts, and as the granting of the motion would divest the Receiver of the property, permission was denied. (Trans. pp. 209-210.)

On February 12th, the plaintiff prepared and swore to another petition in intervention (Trans. pp. 211-219), in which after alleging the proceedings in the suit, the prayer of the defend-

ant, the First American Savings Trust Company of Hawaii, Limited, to foreclose its mortgage, the appointment of the Receiver, the contract of February 21, 1900, the shipment of the goods under it, the fact that they arrived in Honolulu, but that plaintiff refused to deliver them to the Kona Sugar Company until payment or the making of the writing of March 13, 1901, which is alleged to be "a supplementary contract," the delivery of the goods, their use as a plantation railroad, that the title is still in the plaintiff, and that their continued use, wear and tear and consequent depreciation would cause great loss, wherefore, a return of the property was demanded. On the 26th day of February leave was granted to file said intervention. (Trans. pp. 207-8.)

On the 26th day of March, 1903, the plaintiff further applied for leave to join F. L. Dortch, Receiver, in this petition and this leave was granted on the 30th day of March. (Trans. pp. 202-204.)

In the meantime plaintiff had applied for leave to take the deposition of Columbus Bierce and Harry T. Gilbert in these proceedings. The affidavit of H. A. Bigelow, the attorney-in-fact of the plaintiff, (Trans. pp. 198-201,) upon this application sets out the sale of February 21st, 1900, the shipment of the goods, the demand for payment, the failure to pay, the instrument which he calls a letter dated March 13, 1901, the allowance by the Bierce Company of the Kona Sugar Company to take possession of the railroad equipment, that the Bierce Company did not intend to waive or surrender its rights of ownership of the property but "that they merely permitted the Kona Sugar Company, Limited, to take and use the same"; that at no time prior to January, 1903, did Columbus Bierce or the plaintiff have any knowledge that the railroad was on land in which the Kona Sugar Company had neither a fee simple nor a leasehold interest, but that they believed that it was run over land that was owned either in fee simple or in leasehold, and if such were not the case they would not have permitted the railroad equipment to pass into the possession of the Kona Sugar Company, Limited, nor would they have allowed lien proceedings or any

proceedings of any nature whatsoever except for a direct recovery of possession of the property to have been instituted against the said Kona Sugar Company, Limited; and that as soon as Bierce & Company become aware or had any understanding that the railroad ran for the most part over land in which it had neither a fee simple or a leasehold interest, they directed a discontinuance of said proceedings. Depositions were taken under this appointment by stipulation. On the 20th of May answers were filed in this suit. The answer of the Kona Sugar Company, Limited, (Trans. pp. 190-192) alleged that the so-called supplementary contract of March 13, 1901, was executed without any authority of the Kona Sugar Company, Limited; that the Kona Sugar Company, Limited, never agreed nor consented to the same and that the Intervenor had waived all right or title under the alleged supplementary contract and had brought a suit against the Kona Sugar Company, Limited, in assumpsit, for the amount due in the note; that at all times such contract had been treated as void and of no effect, that the articles were sold outright and absolutely; it admitted the note had not been paid, but alleged that the same was secured by bonds still held by the Intervenor.

On the 20th of April, 1903, a decree and order of sale of all the estate and property was made in said action, as before set forth, free and clear of all liens on the ground that the interests of all parties would be best served and protected by the immediate sale of said property for the purpose of paying the debts and liabilities incurred by the Receiver in the management of said property, and to discharge all liens, claims or demands. The railroad, railroad equipment, locomotives, cars and so forth are specifically included. (Trans. pp. 220-224.) The sale was had on the 9th day of May and confirmed June 1st, confirmation being to the defendant in this action and the Receiver directed to convey the property in question, free and clear of all incumbrances. The plaintiff objected to the order of confirmation on the ground that the railroad equipment, locomotives, flat cars and cane cars had been sold and that they were the property of William W. Bierce (Trans. pp. 187-188), which objection was

overruled June 5th, 1903, and appealed, which appeal was denied in the case above referred to (Trans. pp. 182-3-4).

The plaintiff also on August 25th, 1903, brought a writ of error to review the proceedings, particularly the order of sale of April 20th, A. D. 1903, assigning among other errors the directing the sale of said railroad and equipment, particularly while the intervention petition was pending and unsettled and in not excepting said property from sale. This writ of error was dismissed in the case above referred to (16 Haw. 258), the court holding that there was no error in the order of sale; that it did not purport to authorize the sale of any property except that of the Kona Sugar Company and that there was no evidence of any title of the plaintiff in any of the property ordered to be sold.

A demand was made on the defendant and the present action brought July 20th, 1903, for the property, in which the value of the property was set at Fifteen Thousand Dollars ($15,000). This amount was amended at the trial to Twenty Thousand Dollars ($20,000), and after the trial to Twenty-two Thousand Dollars ($22,000). At the trial the complaint was also amended by striking out the allegations that the contract of March 13th, 1901, was a supplementary contract, wherever the same appeared in the complaint. At the trial the plaintiff endeavored to show that the road ran over land upon which the Kona Sugar Company, Limited, had no right, either in fee simple or leasehold, but the testimony showed that none of the property purchased from the plaintiff was upon such land, but that the entire right of way had been secured by the Kona Sugar Company, Limited, excepting as to the portion of the road running on the Paris land, which was built entirely from material purchased from other people. Testimony of M. F. Scott (Trans. pp. 88, et seq.).

The court made findings of fact and drew conclusions of law, (Trans, pp. 266-271,) finding the making of the contract of February 21st, 1900, the shipping of the material, that it did not pass into the possession of the Kona Sugar Company, Limited, until after contract of March 13, 1901, was entered into; that the parties entered into the contract of March 13th, 1901; that

the payment of the Ten Thousand Dollars ($10,000) and the giving of the note was intended to be and was in settlement of the contract of February 21st, 1900, and not as a consideration of the purchase price for the materials sued for; that the payment of the note for $37,044.53 was intended to be a condition precedent, the performance of which was to divest the plaintiff of the title to the property sued for; that the contract of the 13th of March, 1901, was an entire contract for a lump sum and was incapable of being apportioned so as to ascertain the price of lienable and non-lienable items, and that such contract was not intended as a chattel mortgage or an absolute sale with lien reserved to the vendor, but was a conditional sale; that some of the property was not in fact used in the construction of the railway and was not lienable; that the plaintiff did not at any time intend and did not in fact waive its title to the property sued for nor did it intend or make any election of remedies or rights so as to bar the bringing of this action, nor did it intend or in fact waive its title by bringing the action to enforce the materialmen's lien, nor rescind this contract of March 13, 1901; that the defendant took possession with knowledge of the plaintiff's claim and title; that the actual value was $22,000 and that the plaintiff had suffered damages in the sum of One Thousand and Forty-five Dollars ($1,045) in addition and that each and every material allegation of the plaintiff's complaint has been established by the evidence.

Under the head of conclusions of law the court found that the contract of February 21st, 1900, was adjusted and settled by the contract of March 13, 1901, that it was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor; that the payment and giving of the note was in settlement and adjustment but not given as a consideration for the purchase price; that the condition precedent, the performance of which was to divest the plaintiff of the title to the property sued for was the payment of the note; that the contract of March 13, 1901, was an entire contract for a lump sum and contained lienable and non-lienable items; that the plaintiff had made no election of either remedies or rights so as to bar the bringing and

maintenance of the action, and that the plaintiff was entitled to judgment as prayed for.

To these findings as well as to numerous rulings during the trial the defendant excepted, the Supreme Court in its decision filed January 28th, 1905, (Trans. pp. 292-299) sustained the exceptions so far as they raised the question of election, and reversed the judgment on the ground that the plaintiff "had previously elected and pursued an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a materialman's lien for the same on the theory that the title to the property had passed to the vendee, the Kona Sugar Company, Limited," holding further that the plaintiff's theory that it was not an election of remedy but a mistake of remedy, did not apply to the case; that while there is no election where a party attempts a remedy in ignorance of material facts or even in ignorance of his legal rights, if the rights of other parties are not prejudiced thereby, yet he could not institute a suit where he waived a privilege reserved for his benefit and afterwards retracted, that the remedy is not ineffectual merely because nothing could be realized, and the fact that in the present case it had been testified that the suit had been instituted without much thought as to its effectiveness and discontinued because it was seen that it would not yield financial results; that the claim of the novated contract had never been tried and that the facts in this case indicate that a portion at least of the material was lienable, as the first contract fixed the price of lienable items and the supplementary contract merely settled the payment of the amount due on the first; that the slight difference between the amounts was probably due to storage and other expenses; that the plaintiff was not ignorant of any of the facts in instituting the lien suit, and it was apparently an afterthought, after bringing the present suit, that the lien suit would have been ineffectual, a fact which could not be tried in the present suit; that while the findings of the trial court have the same effect as the verdict of the jury, on the question of election the material facts are undisputed and the construction of the contracts which are in writing is a matter of law for the court.

The plaintiff appealed for a rehearing on the grounds:

A. That the court failed to decide whether the plaintiff is entitled to a new trial in regard to the recovery of the non-lienable items.

B. That the Court should have decided the question of whether the mechanic's lien suit was effectual.

C. That the testimony of Gilbert and Bierce had been overlooked as to the character of the contract of March 13, 1901.

D. That the Court overlooked the consideration that the lien suit was based on the contract of February 21st, 1900, which had been abrogated by the contract of March 13, 1901.

E. That the Court committed error in assuming that the difference between the contracts was probably due to expenses of storage and otherwise.

F. That no one was misled by plaintiff's action.

G. Manifest error in deciding that plaintiff had made an election.

(Trans. pp. 300-303).

Thereafter the court requested further argument on the following questions:

If the contract was one of conditional sale or an executory contract to sell upon condition precedent—

1. Was it entire?
2. Could the lien suit have been maintained?
3. How far ought the Court to go in the question whether the lien suit could have been maintained?
4. If the lien suit could not have been maintained, did it show an election of rights?
5. Did the plaintiff have a right to elect between an absolute sale and a conditional sale or executory contract to sell?
6. If the defendant had pleaded the lien suit, would the plea have been had on demurrer?

Re-hearing was denied April 29th, 1905, the main opinion by Chief Justice Frear proceeding upon the assumption that the contract was a conditional sale (although it appears that the majority of the court was of the opinion that the sale was absolute), after summing up the points in the prayer for re-hearing as follows: "1. That the Court should have decided, but did not do so, whether the plaintiff is entitled to a new trial as regards the items which, by reason of not having been attached to the realty, were not subject to a materialman's lien, and (2)

that the court overlooked or did not give due consideration to certain points bearing upon the question whether the institution of the materialman's lien suit amounted to an election;" holding that as to the first of these grounds the court originally merely reversed the judgment of the trial court, not knowing whether plaintiff would be able to introduce further evidence bearing on the question of election, which would make it worth while to have a new trial, but as it was now admitted that no further evidence could be offered, that it is a necessary inference that plaintiff could not elect to treat the sale as absolute as to part of the property, and conditional as to the remainder and that the lien suit was in fact instituted as to all the items. As to the second point the former opinion was decisive and the election is not so much between remedies as between rights; between the right of the plaintiff to proceed upon the theory that the sale was conditional and the right to proceed on the theory that the sale was absolute.

Mr. Justice Hartwell joined in the concurring opinion, saying that plaintiff could not blow both hot and cold; that the results of the lien suit would have made the company a preferred creditor of the company's plantation, whereas, by claiming the property nothing else would be obtained than the property, and that the lien suit was a formal avowal made in court to treat the transaction as an absolute sale. (Trans. pp. 305-314.)

Thereafter, on motion of plaintiff, the decision was modified on May 6th, 1905, so that the case was remanded to the Circuit Court with instructions to enter judgment for the defendant with costs. (Trans. pp. 317, 319, 320, 321.) On May 11th, the plaintiff petitioned for findings of fact which are set out in the transcript, pages 322-333. This petition was denied May 16th on the ground that the court had no jurisdiction to make findings of fact. (Trans. p. 333.) On the same date an appeal was prayed for which was not allowed (Trans. pp. 333-5). It was renewed on May 31st and June 21st on the ground that it had been previously disallowed, (Trans. pp. 335-338,) but subsequently in this court the appeal was allowed December 4, 1905,

(Trans. pp. 349-350). There is no statement of the facts of the case unless the findings of the Circuit Court above, which were reversed by the Supreme Court, constitute such a statement as is provided by the act of April 7, 1874.

ARGUMENT.

I.

THE TRANSACTION DID NOT CONSTITUTE A CONDITIONAL SALE.

Although the Supreme Court of Hawaii did not put its decision on this ground, a majority of that court held that the transaction constituted an absolute sale, and this conclusion is not only fortified by reason and authority, but we submit, is an inevitable inference from all the facts in the case. The device of attempting a contradiction in terms by apparently retaining the title in the vendor and then giving to the vendee not only the indicia of ownership but also powers which are inconsistent with the retention of title has been long the subject of judicial reprobation, and the rule is well settled that although there may be an express agreement that title is to remain in the vendor until the performance of some condition, the contract will be construed as an absolute sale where the other circumstances of the case indicate that the parties so intended. As was said by Mr. Justice Strong in the leading case in this Court:

"It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that, if possible or so far as it is possible, they all may harmonize." * * * "The notes became the absolute property of the vendor. As has been stated they all fell due within four months, and it was expected they would be paid. The vendors were expressly allowed to collect them at their maturity, and it was agreed that whatever sums should be collected on account of them should be retained by the vendors for their own use.

"No part of the money was to be returned to the railroad company in any event, not even if the cars should be returned."

* * * "In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price."

Herryford v. Davis, 102 U. S. 205, 26 L. 160.

In a Colorado case the stipulation was: "It is further agreed that the title to such goods, or any part thereof, shall remain in the party of the first part until full payment in cash shall have been made," and the court said:

"In determining this question the entire transaction between intervenors and Smith must be considered, and its legal effect ascertained, not alone by any particular provision of the written contract itself, but from all the stipulations and agreements contained therein, as well as in the notes given in connection therewith. When so considered it is evident, notwithstanding the agreement itself provides that the title to the *seating* shall remain in Andrews & Co. until full payment in cash shall have been made therefor, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, that such an intention is rebutted by the terms and stipulations in the notes given in pursuance of the agreement, they being absolute obligations, making the purchaser unconditionally liable for the purchase price. The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the property delivered, however characterized by the parties, is essentially and in legal effect an absolute, and not a conditional sale."

Andrews v. Colorado Savings Bank, 20 Colo. 313; 46 Am. St. Rep. 291; 36 Pac. 902.

In a Montana case the testimony was that the title was not to pass until the purchase price was paid, but a note was taken with a mortgage on other property and the court held that this showed that the sale was an absolute one. On the authority of *Herryford v. Davis,* the court pertinently says: "If the sale was merely conditional, the taking of a mortgage on other property would be utterly useless."

Silver Bow Mining & Milling Co. v. Lowry, 6 Mont. 288; 12 Pac. 652.

A Wisconsin case is likewise instructive. There the express condition was that the title did not pass until the note was paid. Winslow Judge, after saying that the courts do not favor a conditional sale, calls attention to the fact that a chattel mortgage had been given on machinery, which warranted title in the purchaser and that the giving of the mortgage on the machinery and the other property to secure the payment of the note "is utterly inconsistent with the idea of a conditional sale."

Aultman v. Silha, 85 Wis. 359; 55 N. W. 711.

We observe that in the present case the property was sold with the intention of being incorporated into the plantation as an integral part thereof; the testimony of Bierce is that the price was secured first, by the note, and second, by the mortgage on this property and other property, containing the usual covenants of warranty and lastly, by the reservation of title. (Tr. pp. 87-8.) This is the order which he puts and is the order of Exhibit "A."

In California in a case in which the contract provided that upon the payment of the price "the property is then to belong to said borrower, otherwise it remains the property of Palmer & Rey" and where the contract was in the form of a lease it was held that in spite of the reservation of the title, as the possession was delivered and the promise to pay was absolute (citing *Hart v. Barney,* 7 Fed. Rep. 553) and as there was a provision upon retaking to render the surplus to the borrower, the title passed and replevin could not be maintained. The learned Commissioner says:

"The policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or encumbrancers for value, and in particular, that mortgages of personal property are permitted only in certain specified cases, and then only upon the observance of certain formalities, designed to insure good faith, and to give notice to the world of the character of the transaction, the provision as to mortgages cannot be evaded by any mere shuffling of words. Where it is clear from the whole transaction that for all practical purposes the ownership of prop-

erty was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any mere denial of its legal effect, will not be regarded. The question, it is true, is one of intention; but the intention must be collected from the whole transaction, and not from any particular feature of it."

Palmer v. Howard, 72 Cal. 293.

The only case in Hawaii in which a conditional sale can be claimed to have been upheld was a conditional sale of a safe to a bankrupt, who went into bankruptcy before any payments were made, and it was held that the seller could reclaim the property, the court distinguishing the case on the ground that no part of the price had been paid before bankruptcy intervened and expressing no opinion if partial payments had been made and "deferred payments were required."

Raymond v. Dole, 4 Haw. 232.

In a case, the facts of which are almost identical with this—the sale of a plantation railroad which passed into the hands of a receiver—the judge before whom the case was tried upon a petition and intervention of the seller of the railway and rolling stock, to which the receiver set up the annexation to the soil and the property becoming a part of the security of the mortgages, ordered that the petitioner might remove all the railway tracks, cars, material and appurtenances in proportion to the unpaid balances of the purchase price, but the court held that the sale was absolute and that the railway and its appurtenances were covered by the prior mortgage, saying "that it would be contrary to public policy and injurious to the rights of third parties to allow the petition."

Fowler v. Heeia Sugar Co., 5 Haw. 410.

We think this case very persuasive. It is true that the court says that the claim had not been proved, but the evidence of all the witnesses support a conditional sale.

From these cases it is apparent that, as the validity of conditional sales has been determined within the jurisdiction where the contract was made, resort is properly had to the decisions of this

court. The leading case and the case upon which Appellant relied in the lower courts is that of *Harkness v. Russell,* 118 U. S. 663, 30 L. Ed. 285, in which Mr. Justice Bradley held, on an appeal from the Supreme Court of Utah to recover the value of two steam engines and boilers in a portable saw mill sold in Idaho under a written contract that the title should not pass until full payment, containing an express provision authorizing the vendors to take possession whenever they deemed themselves insecure even before maturity of the note, with the right, if the property were taken back, to sell the same, to endorse the true value on the note and to recover the balance as damages and rental.

"It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be; namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized."

After reviewing the decisions in various states and showing that in these with the exception of Illinois, the view of the law announced by the learned Justice is sustained, the case of *Heryford v. Davis, ubi supra,* was distinguished on the ground that "it contained provisions so irreconcilable with the idea of its being really a lease and so demonstrated that it was an absolute sale with a reservation of a mortgage lien that the latter interpretation was given to it by the Court." This court finally concluded that there is nothing either in the statutes or adjudged law of Idaho to prevent the operation of the general rule already cited.

We accept this decision as the rule of guidance in the case at bar, and will apply it in the light shed upon it by subsequent decisions of this court.

Thus Mr. Justice Harlan says that:

"The agreement in question (in *Harkness v. Russell)* * * * expressly declared that neither the title, ownership nor possession should pass from the seller until the note given by the buyer for the stipulated price was paid."

Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69; 32 L. ed. 854.

Undoubtedly, the learned Justice, means, not possession, but the right to possession.

In a later case the same learned Justice, after quoting *in extenso* from the case of *Herryford v. Davis,* says:

"It is a mistake to suppose that there is any conflict between these views and those expressed in the subsequent case of *Harkness v. Russell,* 118 U. S. 663, 680 (30: 285, 291), where the whole doctrine of conditional sales of personal property was carefully examined, and in which the particular instrument there in question was held to import not an absolute sale but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. With the principles laid down in the latter case we are entirely satisfied. But as pointed out in *Arkansas Valley L. & C. Co. v. Mann,* 130 U. S. 69, 77, 78 (32 L. ed. 854, 857, 858), the agreement in *Harkness v. Russell* was upon the express condition that neither the title, ownership nor possession of the engine and saw mill which was the subject of the transaction should pass from the vendor until the note given by the vendee for the stipulated price was paid. Turning to the notes here in suit, we find every element of a sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all the notes of the series were fully paid."

Chicago Ry Equipment Co. v. Merchants' Nat. Bank,
136 U. S. 268, 34 L. ed. 349.

From these decisions it would appear that the rule laid down by this court is that a conditional sale should not be inferred, but that where the intent to preserve the title in the vendor is clear and there is nothing inconsistent therewith in the transaction, particularly if the right to possession is reserved, then the condition will be maintained.

Applying this rule to the case at bar we find that the intent to reserve the title is not clear and that the inconsistencies are overwhelming. The plaintiff originally sent its agent to sell the property and made an absolute sale without any reservation of title. It again sent an agent to collect the price. While this agent wrote a letter containing the statement that the title was to be reserved the assent of the Kona Sugar Company is equally necessary to this change, and the record of the action of the

directors of the company put in by plaintiff shows that the only authority given to its officials was to sign the note and deliver the bonds, not to change the contract. This evidence was put in by plaintiff to show the validity of the alleged contract of March 13th, 1901. It therefore does not appear that the Kona Sugar Company ever intended to assent to the reservation of title. Again, as a part of the transaction, negotiable promissory notes were taken, apparently in absolute payment, which were indorsed to a third party, and no suggestion is made of their return. Security was taken in the form of mortgage bonds upon this identical property, and within a month Gilbert was given authority to sell the bonds and to negotiate the note, which was indorsed to him, which, according to some authorities, would have been a waiver of lien (*Bank v. Thomas,* 69 Tex. 237; *Burch v. Pedigo,* 113 Ga. 1157; 39 S. E. 493; 54 L. R. A. 808). The property was delivered with the assent of plaintiff for the purpose of being attached to and used as an integral part of a sugar plantation. It further brought a mechanic's lien for the purchase price of the various articles claiming under the original contract and entirely ignoring the alleged conditional sale; upon this it brought its suit in assumpsit to enforce the lien. Not satisfied with this, foreclosure proceedings having been instituted upon the mortgage, it intervened, set up its mortgage bonds and its mechanic's lien upon the property, relying upon the original contract, joining in the foreclosure; it was not until it became evident in January, 1903, that no one would get anything, that it for the first time made any claim to recover the property, and it then did so upon the ground of a mistake of fact in that the sale had been made and the mechanic's lien filed on the theory that the Kona Sugar Company, Limited, owned its right of way, (a theory consistent with an absolute sale,) and it was upon the theory of a mistake of fact that it brought a further petition in intervention seeking to recover the property, which has been decided against it. It was not until after the trial was begun and it appeared that the plaintiff must fail on its claim that it had been deceived as to the facts, that it for the first time claimed that it was entitled to recover

the property on an alleged conditional sale regardless of any mistake of fact.

We submit the entire agreement with the construction put upon it by the parties, and the circumstances which surround it show that it was not the intention or agreement of the parties to reserve the title; and that the terms of the agreement, the construction put upon it by the parties and the circumstances which surround the agreement are all inconsistent with such theory.

Some of these grounds we will separately examine:

(a) Whether the mortgage be prior, contemporaneous or subsequent, it is inconsistent with the theory of the vendor's retention of the title that the plaintiff should have delivered the property to be affixed to the realty.

The general rule seems to be that personal property incorporated in a mortgaged estate with the intention to make it a permanent part thereof becomes part of the mortgage security, and the vendor and vendee cannot as against the mortgagee preserve its character as personalty, although it can be removed without injury either to the realty or the value of the mortgage security.

Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698.

This case ably discusses the cases and adopts the so-called Massachusetts rule as applied to railroads. The law seems to be well settled that railway tracks laid down for permanent use are a fixture and part of the realty and pass even with pre-existing mortgages.

Jones on Railway Securities, Sec. 109.

And such is the rule in this court:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled in the decisions of this court that rails and other articles which become affixed to and a part of a railroad covered by a prior

mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham v. R. Co.*, 68 U. S. 1 Wall. 254 (17:584); *Galveston R. R. v. Cowdrey*, 78 U. S. 11 Wall. 459, 480, 482 (20:199, 206); *U. S. v. New Orleans R. R.*, 79 U. S. 12 Wall. 362, 366 (20:434, 436); *Dillon v. Barnard*, 88 U. S. 21 Wall. 430, 440 (22:673, 678); *Fordick v. Schall*, 99 U. S. 235, 251 (25:339, 342.)"

Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267; 30 L. ed. 1210.

This case was cited and applied in an action where it was sought to displace a former mortgage by a mechanic's lien, where Mr. Justice Brewer, in deciding these propositions, says that the record imparted notice of the terms of the mortgage and that this express lien could not be displaced by a contract with a third party.

Toledo Ry. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905.

In another case where the question was between the contractor to build a section of the road and the prior mortgagee the court held that the prior mortgage was a first lien upon the rails and other fixtures; that all persons claiming in privity with the company were debarred from asserting that the mortgage did not cover all the property and rights which it professes to cover; citing *Galveston H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199, the court continued:

"That by the common law whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies, and not only the rails but those permanent fixtures which are essential to the successful operation of the road, become a part of the property of the company, as much so as if they had existed when the mortgage was executed.

"The doctrine that a vendor not taking security for the price of realty sold by him holds in equity a lien upon the property for such price is not controverted, but it has no application to

the present case. The only right which the complainants possessed was that which was recognized by the decree—a right to redeem the property from the sale under the mortgage—a right which they were allowed to exercise within a specific period; but, they declining to do so, the bill was properly dismissed."

Thompson v. White Water Valley R. R. Co., 132 U. S. 68, 33 L. ed. 256.

In the Galveston Ry. case the court said that under a mortgage of a railway which assumed to convey and mortgage "the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases."

Galveston H. & H. R. Co. v. Cowdrey, ubi supra.

These cases and others cited under the next head have been commented on favorably in a more recent case, which collects the authorities which hold that the track is a necessary and inseparable incident to the enjoyment of the right of way.

New Mexico v. U. S. Trust Co., 172 U. S. 171, 43 L. ed. 407.

The strong inclination of the courts is to hold that a conditional sale is not binding upon creditors, purchasers or incumbrancers, who are deceived or are likely to be deceived by the secrecy of the contract.

Collins v. Houston, 138 Pa. 431; 21 Atl. 234.
Loving Pub. Co. v. Johnson, 68 Tex. 273; 4 S. W. 532.
Ryder v. Cooley, 58 Conn. 367; 20 Atl. 470.

As was said in an Alabama case, which we shall cite upon another point, any inequitable act on the part of the vendor treating the property as the property of the vendee is a waiver and abandonment of the title reserved on the sale.

Hickman v. Richbury, 122 Ala. 638; 26 Southern 136.

The sale of machinery or other personal property to be attached to the freehold by the vendee is such an inequitable act, and trover will not lie on behalf of one who furnished machinery

for a mill under a contract providing for a payment down and the balance on time, the title not to pass or the machinery become a fixture by being put into any mill until full payment is made; yet, if the plaintiff understood when he sold the machinery that it was purchased for the purpose of being attached to the realty, he could not maintain replevin.

Jenks v. Colwell, 66 Mich. 420; 33 N. W. 528.

"It is very doubtful whether the plaintiff was entitled to maintain replevin even under his construction of the contract. It may be admitted that the buildings in question were chattels, and the doubt remains just as serious. A lease for years is also a chattel, but if a tenant for years sublets, and the subtenant holds over after his term, the remedy is clearly by forcible entry and detainer, and not replevin. It is the nature of the thing itself, and not that of the plaintiff's property in the thing, which determines whether forcible entry and detainer or replevin will lie. It is true, as pointed out by the plaintiff, that this court has held, under certain peculiar circumstances, that buildings may be chattels personal, and subject to replevin; but to allow replevin to be maintained under such circumstances as these makes the writ in effect a writ of restitution for land,—an office which it cannot be permitted to fulfill. Replevin is, in any case, a harsh remedy, permitting the plaintiff to take property upon his bare allegation of ownership, and before any opportunity to try the issue. The court should be very jealous of extending the action beyond the cases to which it was designed to apply."

Oskamp v. Crites, 37 Neb. 837; 56 N. W. 394.

We cite also a line of cases where machinery, consisting of motive power, such as generators, for an electric railroad, is affixed thereto and an indispensable part of the railway, the court will not permit the title to be asserted on a conditional sale any more than in the case of the tracks of the railway itself.

Phœnix Iron Wks. v. N. Y. Security & Trust Co., 83 Fed. 757.

N. Y. Security & Trust Co. v. Capital Ry. Co., 77 Fed. 529.

Evans v. Kister, 92 Fed. 828.

In these cases the rights of mortgagees to after acquired property were declared, but a distinction drawn as to the rolling

stock, a distinction which we will hereafter show is not pertinent to this case, as the mortgage contemplated the railroad with the rolling stock as a part of its security, and the vendor took a lien on this rolling stock as well as upon the realty, to secure the purchase price.

As to the articles claimed not to be affixed to the realty the only ground on which the plaintiff can recover is that he had no lien since there was an entire contract for an entire sum, but if some of the articles were to be affixed then the delivery of these to be affixed would be inconsistent with the retention of title to any.

The Massachusetts cases referred to fully support the proposition that where property, whether it be machinery, rails or similar property, is delivered to be attached and which is attached to a railroad, it becomes so inseparably incorporated that it cannot be removed for non-payment of the price, as against a bona fide purchaser or incumbrancer or mortgagee.

Hunt v. Bay State Iron Wks., 97 Mass. 279.
Hopewell Mill Co. v. Taunton Savings Bank, 150 Mass. 519; 23 N. E. 327.
Meagher v. Hays, 152 Mass. 228; 25 N. E. 105.

Whether the rolling stock and equipment of a railroad is real estate or personal property, and it has been well said that this court inclined to regard them as chattels real, it is well settled that the rolling stock as respects mortgages is inseparably connected with the road bed and is a fixture.

Milwaukee & M. R. R. Co. v. James, 6 Wall. 750.
Pennock v. Col., 23 Howard 117, 16 L. ed. 436.
Galveston R. R. Co. v. Cowdrey, ubi supra.

Neither is this rule modified by cases like

United States v. New Orleans & Ohio R. R. Co., 12 Wall. 362; 20 L. ed. 434, and
Fosdick v. Schall, 99 U. S. 251, 25 L. ed. 339.

as to loose property susceptible to separate ownership, for in this case, unlike the vendor in those cases, the mortgage upon the same property was within the contemplation of the parties as a part of the transaction, nor is it like the case of *Bear Lake, etc.,*

Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, where the property came into the hands of the mortgagor subject to the lien. The principle of the latter case is, as Mr. Justice Peckham says in the opinion "in entire harmony with the Galveston Railroad case" and we concede that where a railroad acquires loose property as for instance locomotives either as additional or to replace worn-out engines after the execution of the mortgage although the lien of that mortgage attaches to the locomotives, yet if nothing but an equitable title passed the lien of the mortgage only attaches to that equitable title, but if the mortgage is made of a prospective railroad to be fully equipped, the rolling stock being necessary to the operation of the road, we submit that in that case where the mortgage clearly contemplated the equipment of the road in order to operate it, that this court would be loath to hold that a vendor having knowledge of the mortgage could retain title for the original equipment on the basis of which the mortgage was made, and which was necessary to make the entire enterprise a going concern; but in the case at bar it does not appear that the mortgage was prior, it is apparently contemporaneous, and our contention is that since the whole transaction is to be construed, the law will not allow the vendor to say as against other bondholders that the mortgage is not a prior lien on this equipment. It is a case of a contract inconsistent in itself.

In a case already cited Mr. Justice McKenna says in speaking of the principles which apply to the corporeal quality of railroads:

"One of these and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts. As to rails put down against him from whom purchased *Galveston H. & H. Railroad Co. v. Cowdrey,* 11 Wall. 459 (20:199); *United States v. New Orleans Railroad Co.,* 12 Wall. 362 (20:434); *Thompson v. White Water Valley R. Co.,* 132 U. S. 68 (33:256), even though the contract of purchase provided that the property should remain that of the vendor and he have a right to remove the same *(Porter v. Pittsburg Steel Bessemer*

Co., 122 U. S. 267 (30:1210, and cases cited); in determining the relation of the rails to the right of way, *Joy et al. v. City of St. Louis*, 138 U. S. 1 (34:843). In this case, Mr. Justice Blatchford said: "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way."

New Mexico v. U. S. Trust Co., ubi supra.

See also:

Palmer v. Forbes et al., 23 Ill. 301.
Hunt v. Bay State Iron Co. et al., 97 Mass. 279.
City of New Haven v. Fair Haven & W. R. R. Co., 38 Conn. 422.

We also cite to the point that the innocent purchaser for value, which includes an execution creditor, a mortgagee, and anyone claiming under such, is not affected by the agreement and that, as to him, it is waived.

Thompson v. Smith, 111 Iowa 718; 83 N. W. 789.
Stillman v. Flenniken, 58 Ia. 450; 10 N. W. 842.
Fifield v. Farmers' National Bank, 148 Ill. 163; 35 N. E. 802.

Western Transportation Co., 37 Barbour 509.

The rights of the mortgage bondholders are available here as a defense in replevin for the rolling stock as well as the rail, as Hutchins, as the successor to the rights of the mortgagees under the sale, is entitled to make this defense.

Ryles v. Knowles Loom Wks., 87 Fed. 976.

He is also entitled to make all the defenses which the receiver, whose title he received, could make and replevin would not have lain against the receiver under these circumstances.

Hart v. Barney & Smith Mfg. Co., 7 Fed. 543.

(b) Taking the negotiable promissory note, the endorsement of it and the proposed sale of the collateral is inconsistent with a conditional sale.

Bank v. Thomas, ubi supra.
Burch v. Pedigo, ubi supra.
Farrar v. Brackett, 86 Ga. 463; 12 S. E. 686.
McCullough v. Prichett, 120 Ga. 585; 48 S. E. 148.

(c) Taking the mortgage bonds as security was inconsistent with the retention of title in the plaintiff.

Taking the mortgage bonds cast the fortune of the plaintiff with the other holders of the bonds. As was said by Mr. Justice Brewer in a case where it was sought to enforce a mechanic's lien by a builder of a dock, in which it was held that the mechanic's lien was subordinate to the first mortgage bondholders, the mortgage was notice to all the world of the lien, and in that point of view the case does not show a hardship, as the plaintiff must have known that he took subject to the rights of the other bondholders. Acting with full knowledge of all the circumstances plaintiff has no right to complain if its agreement is less remunerative than if the bondholders had joined with the company in making a contract.

Toledo R. R. Co. v. Hamilton, 134 U. S. 296 (33-905).

As a bondholder it is estopped from asserting that the mortgage does not cover all the property and rights which it professes to cover, that the rolling stock as well as the superstructure and fixtures of the road as it came into existence become instantly attached to and was covered by the mortgage.

Galveston R. R. Co. v. Cowdrey, ubi supra.

Taking the mortgage which presumably warrants that the title is in the Kona Sugar Company, Ltd., is clearly inconsistent.

Austin v. Hamilton, 96 Ga. 759; 22 S. E. 304.
McCormick Harvester Co. v. Lewis, 52 Kan. 358, 35 Pac. 12.
Aultman v. Silha, ubi supra.
Silver Bow Mining Co. v. Lowrer, ubi supra.

(d) The delivery of the property and its use without claim of title for two years is inconsistent with the claim of the vendor's retaining title.

The mere delivery of the property itself has been held presumptive evidence of the waiver of the condition.

Peabody v. McGuire, 79 Me. 572; 12 Atl. 630.
Farlow v. Ellis, 15 Gray 229.

And the granting of additional time was such a waiver.

Cole v. Hines, 81 Maryland 476; 32 Atl. 196.
Hutchins v. Munger, 41 N. Y. 155.

How much more is the definite intention that the property should be incorporated into the plantation, should come under the security of a mortgage being negotiated at the same time, and the security of which mortgage was taken to secure the purchase price.

The property was delivered in March of 1901. No claim of a conditional sale was made until February, 1903. The letter of the agent of plaintiff with the assent of the president and treasurer of the Kona Sugar Company upon it appears to have been within the exclusive possession of the plaintiff, and even if known was treated as of no consequence by all parties. In the meantime the property sold had been incorporated into the plantation, was used as an essential part of its operating machinery, the plaintiff was retaining the note and the bonds to secure it, evidently relying upon this security to collect its debt, until the plantation was placed in the hands of a receiver, and even then it did not rely upon the alleged conditional sale. As Mr. Bierce testifies, it was not until he became convinced that the plantation was a failure and was not going on, that it claimed a conditional sale. In the meantime hundreds of thousands of dollars of debt had accrued on the faith of the plantation as a whole, and the situation of the parties had been materially changed. We think the failure to enforce the lien under these circumstances or to make any claim shows a construction of the contract inconsistent with such rights.

Hickman v. Rickburg, ubi supra.

(e) The agreement contained no provision for recaption.

(f) The agreement contained no provisions in regard to the relations of the parties should the property be retaken.

There is no provision that the property be sold and applied on the note, the vendor holding the balance as damages for breach of contract, nor for the return of the note on the retaking of the property, or that the sums paid should be considered as rent for the value of its use—none of the ordinary provisions fixing the rights of the parties upon the retaking, are contained here. The absence of these provisions show that a conditional sale was not in the minds of the parties.

II.

IF THE SALE WAS CONDITIONAL, THE CONDITION WAS WAIVED.

(a) The delivery of the material to be affixed or used as an integral part of the Kona Sugar Company's plantation, mortgaged as a whole to secure the bonds, is such a waiver.

The authorities cited under the last head covers this point.

(b) The filing of the mechanic's lien is a decisive act of the party determining his election between two alternative and inconsistent rights, namely, the right to claim the title to the property as in the plaintiff, or the abandonment of the claim of title and the assertion of the right to claim a lien against it as the property of the Kona Sugar Company.

As was said by Mr. Justice Holmes in *Snow v. Alley,* 156 Mass. 193, relied upon by the plaintiff:

"Election exists when a party has two alternative and inconsistent rights and it is determined by a manifestation of choice."

The right which the plaintiff had was to claim the title to the property or to waive that claim, and the filing of the mechanic's lien was a distinct manifestation of choice to waive the claim of title. It is a decisive act of the party determining his election made with knowledge of his rights.

Sanger v. Wood, 3 Johnson 416.

The doctrine of *Butler v. Hildrith,* 5 Metcalf 49, has been fully affirmed in a case in which the court reviewed the cases and said:

"In *Connihan v. Thompson,* 111 Mass. 270, at p. 272, the court said: 'The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon.'

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

Robb v. Voss, ~~115~~ 155 U. S. 13, 39 L. ed. 63.

The attempt even though it be ineffectual, to establish a materialman's lien on property sold is an election to waive the condition in a conditional sale, and is an abandonment of the title reserved.

Hickman v. Richburg, ubi supra.

National Foundry, etc., Wks. v. Oconto, etc., Co., 113 Fed. 793.

Kenney v. Townsend, 124 Iowa 332; 100 N. W. 48.

Lehman v. Van Winkle, 92 Ala. 443; 8 South. 870.

There is no evidence in this case of any lack of knowledge of the facts. The plaintiff sought to show that these rails were laid upon the property to which the Kona Sugar Company had no right, the evidence absolutely shows that they were attached to the property where a right of way had been acquired. The plaintiff completely failed to show that its lien was ineffectual.

The claim of the plaintiff on this point is that the contract for the sale of the material was for an entire price and therefore not lienable. It is sufficient to say that this fails for two reasons. Under the law of Hawaii whether plaintiff could have enforced its lien or not, it could have obtained a judgment in its

assumpsit suit against the receiver whom it had been allowed to sue. What priority would have been allowed the judgment is another matter. The remedy was not ineffectual even if it be admitted that the lien could not be established.

Holt Mfg. Co. v. Ewing, 109 Cal. 353.
Ormsby v. Dearborn, 116 Mass. 386.
Nield v. Bourbon, 49 Mich. 53.

The cases cited by plaintiff in the Supreme Court of Hawaii do not sustain the converse of this proposition. They are discussed in the petition for rehearing and the strongest of these is *Johnson-Brickman Co. v. Mo. Pac. R. R. Co.,* 126 Mo. 344, which cites as an authority for its decision *Butler v. Hildrith,* which holds the reverse. In addition to the reasons pointed out by the Supreme Court of Hawaii for not following the Missouri case, there is a ground upon which it can be reconciled with the current of decision, namely, that the plaintiff in bringing the attachment suit in that case, acted under a mistake of fact, supposing that it had attached the property when in fact the property was not held under the attachment. The case shows merely an attempt to attach by garnishee process, and in fact no attachment was made.

Waiving the suggestion of the Supreme Court of Hawaii that plaintiff had at least the right to try that question and that the present forum was not the appropriate one to try it, it had a lien. The original complaint set forth the agreement of March 13, 1901, as supplementary to the contract of February 21-22, 1900, while the amendment alleges that it was made to "settle and adjust" the contract of February 21-22, 1900; the terms settle and adjust do not mean the substitution of a new contract for an old one, the word "Settlement" as used in the agreement of March 13, means a settlement of the terms of payment. The words "settle or adjust" when applied to a liquidated account or demand, as in this case, mean to pay it.

1 Am. and Eng. Ency. of Law, p. 641.
State v. Staub, 61 Conn. 553-568.

So the settlement made by the agreement of March 13, 1901,

did not affect the price of the materials as set forth and ascertained by the contract of sale and purchase of February 21-22, 1900. The amount stated in the agreement of March 13, 1901, was the same as in the contract of February 21-22, 1900, less the value of the rails not delivered with the charges ordered. There being nothing in relation to the material, or the price thereof, contained in the agreement of March 13, 1901, that is inconsistent with the contract of February 21-22, 1901, the two should be construed together. When a second contract does not expressly abrogate the first, and is not wholly inconsistent with it, then the second contract is supplementary to the first, and the two will be construed together.

9 Cyc. L., p. 596.
Uhlig v. Barnum, 61 N. W. 749.

Certainly the first contract could have been construed with the second for the purpose of arriving at the items of material sold and the prices of the same. The parties had agreed upon these items and their value, and to this agreement the court would have looked for the purpose of the materialmen's lien, even if the contract of March 13, 1901, was an extinguishment of the first contract. The statement of this proposition is, we contend, so plainly the law, that it argues itself.

(c) *Bringing an action for the price is such an election.*
Richards v. Schreiber, 98 Iowa 422.
Marston v. Baldwin, 17 Mass. 611.
Smith v. Barber, 153 Ind. 322.
Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co., (S. Dak., 1904) 99 N. W. 854.

In the Iowa case the same claim was made as in this action, that it was brought by attorneys not fully advised of the facts and that it should not be treated as an election of remedies.

Perhaps a better rule in a case of this kind is that indicated by the Supreme Court of Hawaii in its opinion that even if an action for the price does not constitute an election, such an action accompanied by an attachment of the property is an

estoppel by election on the theory that the attachment recognizes the title as being in the vendee, citing:

Crompton v. Beach, 62 Conn. 25.
Smith v. Barber, 153 Ind. 322.
Bailey v. Hervey, 135 Mass. 172.
Fuller v. Eanes, 108 Ala. 464; 19 So. 366.
Heller v. Elliot, 45 N. J. L. 564.
Button v. Trader, 75 Mich. 295.
Parke, etc., Co. v. White River, etc., Co., 101 Cal. 37.
Ormsby v. Dearborn, 116 Mass. 386.
Allbright v. Meredith, 58 Ohio St. 194.

(d) The presentation of the claim and intervention in the receivership is also a waiver.

The presentation of a claim against an estate, instead of retaking possession, is such a waiver.

Holt Mfg. Co. v. Ewing, ubi supra.

This case was decided upon the authority of *Ormsby v. Dearborn, ubi supra*, to the same effect, but the plaintiff sought to avoid his election on the ground that he did not know the real condition of the estate when he presented his claim and afterwards that it turned out that the claims largely exceeded the assets, but as there was nothing in the record tending to show that the plaintiff was misled by anyone as to the condition of the estate, the court overruled the point, which is the contention of the plaintiff in this case. He cannot now change his election. To this point that a party is bound by his election, we cite:

Butler v. Hildrith (Mass.), *ubi supra.*
Holden v. Metropolitan Nat. Bank, 151 Mass. 112; 23 N. E. 733.
Whiteside v. Brawley, 152 Mass. 133; 24 N. E. 1088.

The procedure of intervention was in accordance with the rules of law prevailing in receiverships, and when property is in the hands of a receiver this is an available remedy.

Fosdick v. Car Co., 99 U. S. 256, 25 L. ed. 344.
Central Trust Co. v. Tex. & Pac. Co., 23 Fed. 1673.

Mr. McClanahan testifies (Tr. p. 69): "We did not take this action in the first instance because we knew to take these rails back, if the property of the Kona Sugar Company, would mean the collapse of the company, and so filed the lien."

The testimony of McClanahan and the Bierces make it clear that they relied either on the materialman's lien or on the lien of the mortgage, and by intervention in the action procured authority to bring a mechanic's lien suit, and also sought to have it declared that the property should be sold subject to the lien of the mortgage on the ground that the mortgage secured its claim. The sale was made for the benefit of the mortgage and those claiming under it, but not subject to it as prayed for. The California case is authority to the point that having sought to establish their claim in that action they cannot now, because they think they can realize more money in another way, take an inconsistent position.

(e) The lien was waived by the conduct of the plaintiff with respect to the Receivership.

As is well said by the Alabama court, the lien is waived by any inequitable act. It is clearly inequitable conduct (whether or not any specific act in this case constitutes a waiver by the plaintiff,) to encourage the carrying on of the plantation under a receivership, to join in the proceedings, to file its claim of lien in order to retain a priority against the funds in the hands of the Receiver, (a claim which would be subordinate to the expenses of the Receivership,) and then after a year of unsuccessful operation when the property is sold to pay the expenses of the Receivership, to turn around and claim the property itself. We place this ground not on any specific act, but that plaintiff's whole conduct conclusively shows a waiver.

Hinchman v. Pt. Defiance Ry. Co., 14 Wash. 349; 44 Pac. 867.

Engine Co. v. Hall, 89 Ala. 630; 7 So. 187.

Irrespective of all the other considerations the delay in asserting the title under the circumstances is of itself a waiver.

Patten v. Smith, 5 Conn. 196.

Leatherbury v. Conner, 54 N. J. L. 172; 23 Aal. 684.

Gorham v. Holden, 79 Me. 317; 9 Atl. 894.

Owenby v. Swann (Tenn.), 59 S. W. 378.

III.

THE TRANSACTION CONSTRUED MOST STRONGLY IN FAVOR OF PLAINTIFF CONSTITUTES AT BEST A MORTGAGE AND NOT A CONDITIONAL SALE.

The rule laid down by innumerable cases is, that although the language of the instruments used in the transaction may be that of a conditional sale, if there is on the part of the buyer an unconditional promise to pay, the transaction will be considered an absolute sale with mortgage back and not a conditional sale.

In the case of *Herryford v. Davis, ubi supra,* Justice Strong says:

"Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale; this giving of property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in case of a conditional sale."

Andrews v. Colorado Savings Bank we have already cited. In *Hart v. Barney, ubi supra,* the court referring to the language used in *Herryford v. Davis, ubi supra,* says: "The court means by 'only a conditional sale' one that is really a conditional sale both to the buyer and seller, i. e. that the payment of the purchase money as well as the passing of the title is conditional. If, by the terms of the agreement, the purchaser becomes liable unconditionally for the purchase price, although by the agreement he may never get the title and ownership of the property, then the agreement is an evasion of the Registration Statute, as its purpose is simply to retain a secret lien."

Later on the learned judge says: "This provision makes the buyer bound unconditionally for the purchase price even though he never gets the title and ownership of the property. Is not this conclusive evidence that the agreement, while it evidences

a conditional sale is merely a device to retain a secret and unrecorded lien on the property sold."

In *Dowdell v. Umpire Furniture & Lumber Co.*, 84 Ala. 316: 4 So. 31, the plaintiff delivered certain goods, taking in payment therefor three notes, with an oral agreement that the title to the goods should remain in the plaintiff until the notes were paid. Judge Clopton says:

"The instrument possesses the essential elements and characteristics features of a mortgage. A continuing liability for the purchase price, after the failure to perform the condition and the vendor has acquired possession of the property, is wholly inconsistent with the character of a conditional sale. The notes of B & Co. belong to the plaintiff which they had a right, by the terms of the contract, to retain though they might take possession of the goods. Claiming both the furniture and the notes as their property under the agreement is a claim of antagonistic rights unless the instrument operates as a mortgage. *Herryford v. Daris, ubi supra; Hart v. Barney, ubi supra.* The construction and legal effect of the instrument is that the retention of title was intended as security for an absolute debt contracted for the price of the furniture. It operates as a chattel mortgage."

In *Chicago Ry. v. Merchants' Bank, ubi supra,* notes were given by the vendee to the vendor in payment of certain cars sold to vendee under an agreement by which title was to be retained by the vendor until the notes were fully paid. The court (Harlan Justice), rendering the decision, held that this agreement could not be considered a conditional sale: the vendee having absolutely promised to pay the notes and must, therefore, be considered an absolute sale with a mortgage back.

Osborne v. Connor, 4 Kan. App. 609: 45 Pac. 327. The plaintiff sold and delivered to the defendant a binder, defendant executing and delivering to plaintiff several promissory notes, together with an agreement that the title to the binder should remain in the plaintiff until the notes were all paid, and if the notes were not paid the plaintiff could seize and sell the machine and apply the proceeds to the notes.

Clark, J., says:

"That while the clause set out in the notes, with reference to the retention of title, the ownership and right of possession of the property in the payee until full payment of the purchase price had been made, would indicate that a conditional sale was intended, we think the other provisions of the notes evidenced an absolute sale of the binder with a retention of the title and right of possession only by way of security for the payment of the purchase price, and that the agreement for such retention was, in effect, a short form of chattel mortgage."

In the case at bar it will be seen that not only were notes given for the entire price of the railway materials furnished by the Plaintiff-Appellee, but also these notes were secured by bonds of the Kona Sugar Company, secured by mortgage on this and other property. It was made a specific part of the agreement that these notes should be so secured: the notes themselves were negotiable and at one time were endorsed over to third parties. Add to this the testimony of W. W. Bierce, the president of the Plaintiff-Appellee, that he took a stipulation that title to the goods should remain in the Bierce Company as a *further security for the payment of the notes,* and there is not a case in the reports as strong as the present one in every element which would make the court declare the transaction to be an absolute sale with a mortgage back, either by virtue of the bonds or this agreement. Furthermore, the conduct of the Plaintiff was entirely consistent with such an intention. The Plaintiff's testimony is that in order to make their notes good they were desirous of having the Kona Sugar Company continue in business. No such desire could exist if the sale had been considered purely a conditional sale by the parties. Furthermore, the goods were placed and were intended to be placed upon the freehold of others, where the Plaintiff must have known it would be impossible for the Kona Sugar Company to themselves revoke the transaction.

We, therefore, contend that not only do the courts lean most strongly toward calling every case of conditional sale, an absolute sale, with mortgage back, but that this particular case is most strongly and evidently, both by the intention of the parties and

the construction of the law, an absolute sale. The very idea of an absolute promise to pay, coupled with a right existing in behalf of the payee of the notes to retake the property without extinguishing thereby the obligations of the notes is, as the courts most frequently say repugnant to the very essence of a conditional sale, which is that the vendee as well as the vendor, shall have the right under certain conditions to revoke the entire transaction.

IV.

THE PLAINTIFF CANNOT MAINTAIN THIS ACTION SINCE ITS INTERVENTION IN THE ORIGINAL ACTION WAS EITHER PENDING OR HAD BEEN DECIDED AGAINST IT.

This intervention dated February 12th, 1903, and filed March 20th (Trans. pp. 211-219) sought the ascertainment of the amount due on the promissory note, that it be decreed that the receiver, the Kona Sugar Company, Limited, or any third person should pay the amount, or upon failure thereof to deliver the engines, cars and other railroad equipment to the plaintiff upon the surrender of the promissory note and all the collateral securities. The order of sale made April 20th, 1903, has the effect of adjudicating this petition adversely to plaintiff, since that order directed the sale of the railroad equipment, locomotives and cars free and clear of all liens or incumbrances. The plaintiff duly appealed from this order of sale and also from its confirmation, and the court said in its opinion upon the appeal from the order of sale that there was no evidence in the record that the plaintiff had any title to the property. (16 Haw. 260.)

If the plaintiff had shown title the amount found might have been awarded to it out of the proceeds of the sale.

Fosdick v. Car Company, 99 U. S. 256; 25 L. ed. 344.

In that case although the Chief Justice says that the restoration of the cars might have been decreed, it is clear that he means restoration before the sale, as restoration after the sale would be at the expense of the purchaser, whereas the payment of their value out of the funds is at the expense of the seller.

V.

THERE BEING NO STATEMENT OF FACTS IT MUST BE ASSUMED THAT THE EVIDENCE SUPPORTS THE JUDGMENT.

If this cause is properly before the Supreme Court, and the order of this court allowing the appeal is at least a *prima facie* adjudication, that the procedure is under the Act of April 7, 1874, and that as to appeals brought to this court on the ground that more than Five Thousand Dollars ($5,000) is involved in the judgment the procedure should not be that provided in the Organic Act, but by the general act in reference to territories referred to, then we submit that there is in the record no sufficient statement of facts in the nature of a special verdict under the Act of Congress of April 7, 1874, and the judgment must be affirmed.

Marshall v. Bertis, 172 U. S. 630; 43 L. ed. 579.
Cohn v. Daley, 174 U. S. 539; 43 L. ed. 1077.

The findings of the Circuit Court are not sufficient because these findings were reversed by the Supreme Court which arrived at a different conclusion, in large part reached from facts not found or passed upon by the Circuit Court. Again, the order modifying the decision and the direction to enter judgment and the judgment (Trans. pp. 319-320) which was entered at the request of the plaintiff, was based on these facts and a new fact, not in the record, namely, that the plaintiff has no further evidence to offer on the question of election which would make it worth while to have a new trial. It cannot be that the findings of fact of the Circuit Court on which it found judgment for the plaintiff are to be considered as a statement of facts upon which the Supreme Court ordered judgment for the defendant.

We respectfully submit that the judgment of the Supreme Court of Hawaii should be affirmed.

A. B. Browne,
Alex. Britton,
John W. Cathcart,
William R. Castle,
David L. Withington,
For Respondent.

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